State of New Hampshire
OFFICE OF ATTORNEY-GENERAL

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March 12, 1957

His Excellency, Lane Dwinell
Governor of New Hampshire
Concord, New Hampshire

Dear Governor Dwinell:

I have your letter of March 8, 1957, in which you refer to the opinion of Attorney General Wyman rendered on February 27, 1957, concerning the powers of the Governor and of the Executive Council in matters of nomination and appointment.

Noting the constitutional requirement of the concurrence both of the Governor and of the Council in nominations as well as in appointments you inquire concerning the status of a nomination following a failure to concur in the appointment. As you are aware, judicial comments upon the power of the Governor and Council in this regard are few and none is found which is pertinent to the present inquiry.

The following would seem to follow, however, upon the language of the Constitution and upon the principles enunciated by Mr. Wyman.

The process of placing an individual in one of the offices under consideration consists of two related but separate acts - the nomination and the appointment. The one is preliminary to the other; but each is of equal dignity. Each requires, as noted, the concurrent action of the Governor on the one hand and of the Council on the other.

The act of nomination is complete upon the happening of the final incident in the concurrence - as, for example, the pronouncement of the vote. Thereafter the legal condition created by the act of nomination subsists until a new legal condition is brought about, whether by the revocation of the nomination through acts specifically designed to that end, by a failure in concurrence in the act of appointment, or by merger of the nomination with the appointment itself.

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At the risk of laboring the obvious, but as a necessary step in the orderly development of the subject, it is noted that a nomination must cease to exist when, upon being subjected to the appointing act, concurrence by both the Governor and Council is had therein. The nomination is merged in the appointment and the appointing process is completed. It would seem equally clear that a failure of concurrence in the appointing act voids the nomination. The nomination had but one purpose; it was the required foundation for the appointing act. The appointing act having failed, the action preliminary to it must likewise be deemed to have fallen.

The question of the revocation of a nomination by appropriate action requires at least a passing reference to the subject whether a nomination once made must be considered on the issue of appointment. These observations would appear pertinent: the act of nominating is a formal one which must be presumed to have been taken with a view to the ultimate taking of the next step, that of appointment. However, there is no procedure outside the Governor and Council themselves which could compel the taking of the second step. Certainly the nominee has no vested right in compelling action; nor is such right seen to reside in any other individual or body, public or private. Indeed, the three-day period specified in the Constitution may well have been designed not only as a guide in the appointing act but also an interval during which the nomination might be revoked.

Revocation prior to the submission of the nomination to the second act in the appointing process must necessarily be accomplished through the concurrent will of both of the parties upon whose combined authority the nomination rests. Certainly as a matter of principle, the nomination as an accomplished fact having been brought into being by both the Governor and Council, it cannot expressly be withdrawn without the exertion of an equal combination of power.

However, as a practical matter, the same result may be achieved by unilateral action in formal proceedings at or prior to the time of considering the matter of appointment. Thus, the announcement of the Governor that he will not concur in the appointment would seem to obviate the necessity of submitting the matter to an actual vote on the issue of appointment. So if the Governor were to introduce the subject of a subsisting nomination by language indicative of the fact that he would not concur in the appointment - whatever the form of his language - the nomination would be rendered without effect without the necessity of further formal action. To require further submission of the question would be to compel a useless act; and this the law will not do.

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It is trusted that the foregoing comments will be of assistance to you.

Very truly yours,

Warren E. Waters
Deputy Attorney General

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